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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946. No. 367.

JOHN MYERS,
Petitioner,

v.

READING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1946. No. 367.

John Myers, Petitioner,

v.

Reading Company, Respondent.

STATEMENT OF QUESTION INVOLVED.

Did the United States Circuit Court of Appeals for the Third Circuit err in affirming the judgment entered for the Respondent railroad, where the evidence fails to support the averment that the petitioner was injured by an inefficient or defective brake?

STATEMENT.

On June 10, 1944, the Petitioner was a freight conductor in charge of a shifting crew at the Port Richmond yard of the Respondent and engaged in the furtherance of interstate transportation. Early in the evening of that day the crew had shifted seven coal cars and coupled them to three other coal cars standing near a bumper on one

of the tracks in the yard. The petitioner in checking the draft to see that the brakes had been applied, found that the brakes on the seventh car from the engine had not been applied. While the engine was coupled to the draft, Petitioner mounted the brake step of the seventh car and began to apply the brake. As he was tightening the brake with his lantern over his left arm, he felt a jolt on his car as the car moved eastward. He then removed his left hand from the brake wheel to give a stop signal with his lantern and as he did so the wheel on the brake "kicked back" and he fell to the ground injuring his back. The petitioner sued under the Federal Employer's Liability Act of April 22, 1908, c. 149, 35 Stat. 65; 55 U. S. C. A. Sec. 51 *et seq.*, as amended, and the Federal Safety Appliance Act of March 2, 1893, 27 Stat. 31, c. 196, 45 U. S. C. A Sec. 11 as amended, alleging negligence in the unauthorized movement of the train and in supplying a defective brake and couplings upon the car in question.

Most of the allegations in the Complaint and most of the evidence as to the occurrence related to the movement of the draft of cars without any signal from the petitioner, but the jury, in answer to interrogatories propounded by the trial Judge, found that the draft of cars did not move after the seven cars had been coupled to the three that were already standing, but that the brake which the petitioner was applying was not efficient (171a). There was no evidence regarding the type of brake nor were there any details as to its mechanism other than what is contained in the testimony of the petitioner (20a-22a, 177a) where the petitioner described the brake as "kind of stiff" and "sticking".

At the conclusion of the trial, the jury rendered a verdict for the plaintiff in the sum of $5,000., following which a motion to set aside the verdict and for the entry of judgment for the respondent was filed and granted by the District Court. This judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

Since there was no evidence of any defective coupling, and the jury found that there was no movement of the car after the coupling of the three cars with the seven cars had been completed, the issue on appeal was confined solely to the question as to whether or not there was sufficient evidence of an inefficient or defective brake to warrant submission of the case to the jury. There is nothing in the record to indicate the type of brake other than the fact that it had a wheel, nor is there any description of its mechanism. There is not the slightest basis for any inference that the brake failed to function while it was being applied, that it was defective in any way, or that it failed to react in a perfectly normal manner after the petitioner released his hold upon it. According to the petitioner's own testimony, it wasn't the action of the brake that caused him to lose his grip and fall, but the jolt of the cars which caused him to remove one hand from the brake wheel for the purpose of giving a stop signal and that when he did so he could not hold with his other hand the brake which he had partially applied and it immediately kicked back or spun around. The petitioner's testimony shows that the brake was not only effective but reacted properly when he released the tension by removing his hand.

The case is similar on its facts to that of *Burnett* v. *Pennsylvania Railroad Co., 33 Fed. 2d 579* (C. C. A. 6th Circuit), where plaintiff claimed a defective hand brake on a freight car caused it to spin violently, throwing him to the ground. It appeared from the plaintiff's testimony that the brake had been set tight and in endeavoring to release it plaintiff used a club thereby increasing the tension on the brake chain and relieving the dog and ratchet lock. At the same time he held the rim of the wheel with his right hand and kicked at the dog with his left foot. A directed verdict for the defendant on the ground that there

was insufficient evidence of an inefficient brake was affirmed on appeal in an opinion reading in part as follows (p. 580):

> "His own voluntary act increased that tension before it took effect. If having thus increased the stress and increased the danger, his hand slipped and the reversing force caught him unready, that was not the result of defective apparatus. The more probable way in which a defect can lead to such a result as this is that it causes, when set, an imperfect holding by dog and ratchet or otherwise, so that there is a 'trigger catch', or some such condition, and the brake releases without the brakeman's intention and before he is ready for it; but here his testimony excludes any such theory."

The petitioner claims the right to a certiorari by reason of the decision in *Lavender* v. *Kurn, 66 Supreme Court 740, 90 L. Ed. 692,* decided March 25, 1946, and argues that the lower court's opinion was based solely upon the ground that since the evidence supports equally two inconsistent inferences of fact, it established neither, since the jury might have inferred that the brake was inefficient as logically as they might have inferred that it was efficient. In that case, however, the facts from which the jury was permitted to draw the inference were in dispute and the Court held that if the plaintiff's or petitioner's version of the facts were believed, there was an evidentiary basis for the verdict in his favor and the jury was free to disbelieve whatever facts were inconsistent with its conclusion. In the instant case, on the contrary, there is no dispute on the facts which are established solely by the petitioner himself and they furnish no basis for the finding of the jury. Mr. Justice Murphy, in his opinion in Lavender *v.* Kurn, states the distinction in the following language (p. 696 of Lawyers Edition):

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different infer-

ences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

The petitioner did not claim that his injuries arose as a result of the pressure exerted when he applied the brake and the evidence shows that his injuries were not sustained as a result of its application. The result followed his voluntary act in removing his hold from the brake wheel as he gave the signal to stop what he testified was a movement of the cars. Therefore, the decision in Lavender *v.* Kurn, *supra,* has no application whatever to this case.

CONCLUSION.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied for the reasons hereinabove set forth.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 367.—October Term, 1946.

John Myers, Petitioner, v. Reading Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 2, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This action for damages alleged to have been caused to the petitioner by the respondent's use, in violation of the Safety Appliance Acts,[1] of a railroad freight car not equipped with efficient hand brakes, presents the question whether the evidence at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the petitioner. We hold that it was.

The action was brought in the District Court of the United States for the Eastern District of Pennsylvania by the petitioner, John Myers, against his employer, the Reading Company. He claimed that he received personal injuries caused by the respondent's use in interstate commerce, in its railroad yards at Port Richmond, Philadelphia, of a freight car equipped with a defective hand brake in violation of the Safety Appliance Acts requiring

[1] "Sec. 2. . . . it shall be unlawful for any common carrier subject to the provisions of this Act [of April 14, 1910] to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and *efficient hand brakes;* all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: . . . ." (Italics supplied.) 36 Stat. 298, 45 U. S. C. § 11.

such cars to be equipped with "efficient hand brakes."[2] At the close of the evidence, respondent moved for a directed verdict. The motion was not granted, and the jury returned a verdict for $5,000 in favor of the petitioner. The respondent then moved to have the verdict set aside and to have judgment entered in its favor.[3] On December 28, 1945, this motion was granted and judgment was so entered. 63 F. Supp. 817. On May 20, 1946, the Circuit Court of Appeals for the Third Circuit affirmed the judgment, *per curiam*. 155 F. 2d 523. We granted certiorari in order to review this procedure, in a case based upon a violation of the Safety Appliance Acts, in the light of our decision rendered on March 25, 1946, in *Lavender* v. *Kurn*, 327 U. S. 645, subsequent to the trial of this case.

The petitioner testified to the following:

On June 11, 1944, he was working for the respondent as a freight conductor in charge of a crew consisting of an engineer, a fireman and two brakemen. He had been employed by the respondent for six or seven years, rising from the rank of crossing watchman to that of conductor and, for five or six months immediately preceding June 11, he had worked practically every day in the job in which he was engaged when injured. At about nine o'clock that evening his crew moved a string of seven coal-cars on to a yard

[2] See note 1, *supra*.

[3] "RULE 50. MOTION FOR A DIRECTED VERDICT.

"(b) RESERVATION OF DECISION ON MOTION. . . . Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ." Federal Rules of Civil Procedure.

track where the crew coupled those cars to three others. One of the brakemen, new on the job that day, made the coupling and the petitioner directed him "to tie the hand-brakes on"—that is, to tighten them so as to insure against further movements of the cars on the slightly graded track. The brakeman did this, but before the petitioner left the cars he checked them over and saw that the brakes were not all on, because one brake chain, instead of being wrapped around the shaft, was hanging loose. He climbed up on the brake platform, eight feet above the ground, on the car where the hand brake was not set, and tried to set it by turning the brake wheel. While doing this, he carried his signaling lantern on his left arm with his hand through the handle. As to the condition and operation of the brake he testified:

"A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

"Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

"A. Not ordinarily.

"Q. What was the difference between this wheel and the ordinary wheel?

"A. It was kind of stiff, and like a spring—like a shoe kicking back.

"Q. And you started to try to set it?

"A. That is right.

. . . . . .

"A. As I was tightening the brake—just that quick—I felt something like the slack being run out, getting ready to uncouple.

"Q. What did you feel on your car?

"A. A quick jar, and I took this hand to signal 'stop.' (Indicating.)

"Q. What did you signal?

"A. I signaled 'stop' the best I could and hold on,

but I went down; I lost my hold and down I went.

"Q. What happened to the wheel on the hand-brake while you were holding the wheel?

"A. That kicked back.

"Q. What do you mean by that?

"A. I was putting it on this way (indicating), and it kicked right back off.

"Q. Could you hold it?

"A. No, I couldn't.

"Q. Was it pulled all the way on?

"A. Oh, no.

"Q. What happened to you?

"A. Down I went."[4]

The jury found, in a special verdict, that the brake was not an efficient brake; that its inefficiency contributed to or caused injuries to the petitioner; that the train did not move after the seven shifted cars were coupled to the three standing cars; and that the petitioner was not thrown from a moving train.[5] The jury thus reached factual con-

[4] Further testimony stated that his injuries were due to this fall. Other testimony supported the petitioner's claim, under the Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51, that the respondent was negligent in moving the train while the petitioner was trying to tighten the brake and without any direction from him. This charge, however, was disposed of by the special verdict of the jury, stating that the train did not move, thus strengthening the probative force of the testimony that the petitioner's fall was caused by the stiffness and kickback of the brake.

[5] The special verdict was as follows:

"1. Was the brake in question an efficient brake?

Answer 'yes' or 'no.' [Answer] No

"2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?

Answer 'yes' or 'no.' [Answer] Yes

"3. Did the train move after the seven shifted cars were coupled to the three standing cars?

Answer 'yes' or 'no.' [Answer] No

"4. If you find that the train moved after the cars were coupled,

clusions supporting its general verdict for the petitioner, and reducing the legal basis for recovery to the respondent's use of a car not equipped with efficient hand brakes.

The only question before us is whether there was sufficient probative evidence, with the inferences that the jury could draw from it, to support the verdict for the petitioner.

There was an absolute and unqualified prohibition against the respondent's using or permitting to be used, on its line, any car not equipped with "efficient hand brakes."[6] In speaking of a like prohibition, imposed by the same Section of the Safety Appliance Acts, against the use of any car not equipped with "secure hand holds or grab irons," Mr. Chief Justice Hughes said:

> "This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." *Brady* v. *Terminal R. Assn.*, 303 U. S. 10, 15, and cases there cited.

See also, *Atlantic City R. Co.* v. *Parker*, 242 U. S. 56, 59 (automatic couplers required by 27 Stat. 531, 45 U. S. C. § 2); *Great Northern R. Co.* v. *Otos*, 239 U. S. 349, 351 (couplers); *Chicago, B. & Q. R. Co.* v. *United States*, 220 U. S. 559, 574–575; *St. Louis & Iron Mountain R. Co.* v.

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did that fact contribute to or cause any injuries sustained by the plaintiff?

Answer 'yes' or 'no.' [Answer] No

"5. Was the plaintiff thrown from a moving train?

Answer 'yes' or 'no.' [Answer] No

"6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?

Answer 'yes' or 'no.' [Answer] No"

[6] See note 1, *supra*.

Taylor, 210 U. S. 281, 294–295 (couplers and drawbars); *Spotts* v. *Baltimore & O. R. Co.*, 102 F. 2d 160, 162 (hand brakes).

This simplifies the issue beyond that presented in the ordinary case under the Federal Employers' Liability Act where the plaintiff must establish the negligence of his employer. Here it is not necessary to find negligence. A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an "efficient" hand brake. Furthermore—

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner." *Didinger* v. *Pennsylvania R. Co.*, 39 F. 2d 798, 799.

> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. . . .
>
> . . . . . .
>
> ". . . the testimony of plaintiff that the brake was

used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of inefficiency as to make an issue for the jury. *Detroit, T. & I. R. Co.* v. *Hahn*, 6 Cir., 47 F. 2d 59. In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not one for plaintiff." *Spotts* v. *Baltimore & O. R. Co., supra*, at p. 162.

See also, *Wild* v. *Pitcairn*, 347 Mo. 915, 149 S. W. 2d 800; and *Newkirk* v. *Los Angeles Junction R. Co.*, 21 Cal. 2d 308, 131 P. 2d 535.

The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony. That testimony was not descriptive of precise mechanical defects in the structure of the brake. It was, however, simple and direct testimony from which a jury reasonably might infer the brake's defectiveness and its inefficiency in the sense necessary to establish a violation of the Safety Appliance Acts. After a brakeman had attempted to set all of the brakes, the chain on this brake still hung loose, indicating that it was not set. When the brake was partially tightened by an experienced freight conductor familiar with that kind of an operation, he found that it differed from the ordinary brake. He found that "it was kind of stiff, and like a spring—like a shoe kicking back." While he was holding the wheel, before it was "pulled all the way on," it "kicked back," he couldn't hold it, and "down" he went. This resulted in serious injuries to his hand and back. While different conclusions might be possible, the jury, which heard the testimony and saw the petitioner's illustrations

of his handling of the brake, reasonably could infer from that evidence that the condition of this brake and its action were not those of an efficient hand brake.

The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence. From the evidence presented, the jury reasonably could find, as it did in its special verdict, (1) that the brake was not an efficient brake, and (2) that the fact that the brake was not an efficient brake contributed to or caused injury to the petitioner. In the face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict.

The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law.[1] As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts. The evidence here was sufficient to support the verdict for the petitioner, whether tested by the formula used by this Court in *Improvement Co.* v. *Munson*, 14 Wall. 442; *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; or *Lavender* v. *Kurn*, *supra*. The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' *Galloway* v. *United States*, 319 U. S. 372, 395; . . . ." *Tennant* v. *Peoria & P. U. R. Co.*, *supra*, at pp. 32–33.

[1] See *Griswold* v. *Gardner*, 155 F. 2d 333, 334, 337.

See also, *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; and *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 524.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn, supra,* at p. 653.

We believe that the evidence given at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict originally rendered for the petitioner. Accordingly, the judgment of the Circuit Court of Appeals sustaining the judgment entered for the respondent by the District Court is hereby

Reversed.